Filed 7/29/16 P. v. Campbell CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DAMON TERRELL CAMPBELL, Defendant and Appellant.	B269590 (Los Angeles County Super. Ct. No. BA155118)

APPEAL from an order of the Superior Court of Los Angeles County. William C. Ryan, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner, Executive Director, and Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill, and Abtin Amir Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Damon Terrell Campbell appeals from the trial court's order denying his petition for recall of his indeterminate life sentence pursuant to Proposition 36. The trial court found that he was ineligible for resentencing because he was armed during the commission of his offense. (See Pen. Code, §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).)[1] Appellant contends that his conviction for possession of a firearm by a felon does not bar him from relief under Proposition 36. We disagree and affirm.

FACTS AND PROCEEDINGS BELOW

In 1997, a police officer saw appellant, a felon, riding his bicycle. When he made eye contact with the officer, appellant withdrew a handgun from his "jacket or waistband area" and held it in his hands. Appellant then dropped the bicycle and ran. While scaling a fence to escape, appellant dropped the weapon. Police arrested appellant and charged him with possession of a firearm by a felon, in violation of former section 12021, subdivision (a)(1).[2] A jury found appellant guilty and also found that he had two prior strike convictions. The court sentenced him under the "Three Strikes" law to an indeterminate term of 25 years to life.[3]

In 2012, appellant filed a petition for recall of his sentence under Proposition 36, which provides for relief from indeterminate life sentences under the Three Strikes law for inmates currently serving sentences for nonviolent, nonserious felonies. (§ 1170.126.) The People opposed the petition,[4] arguing that appellant was ineligible for relief because he was armed during the commission of his offense (see § 1170.126, subd. (e)(2)). The trial court agreed and denied the petition. Appellant timely appealed.

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

[2] In 2010, the Legislature repealed section 12021 and replaced it with section 29800.

[3] This court affirmed appellant's conviction. (*People v. Campbell* (Mar. 23, 1999, B119557) [nonpub. opn.].)

[4] The People supported the opposition with excerpts of the transcript from appellant's trial.

DISCUSSION

Appellant argues that his conviction for possession of a firearm by a felon is not a crime excluded from eligibility for resentencing under Proposition 36, and thus, the court erred when it deemed him ineligible for resentencing. We disagree.

Under section 1170.126, an inmate serving an indeterminate life sentence under the Three Strikes law "upon conviction . . . of a felony or felonies that are not defined as serious and/or violent felonies . . . may file a petition for a recall of sentence." (*Id.*, subd. (b).) Subdivision (e)(2) of section 1170.126 creates an exception, providing that an inmate serving a sentence for an offense described in section 667, subdivision (e)(2)(C) is not eligible for resentencing. Among the offenses described in section 667, subdivision (e)(2)(C) are those in which "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§ 667, subd. (e)(2)(C)(iii) (subdivision (iii)).)

The trial court found appellant ineligible for resentencing under subdivision (iii) because he was armed with a firearm during the commission of the possession offense. Appellant does not deny he possessed a firearm. He contends, however, that possession of a firearm does not preclude him from eligibility for resentencing under Proposition 36. Appellant argues that subdivision (iii) does not apply when "arming" is an element of the offense; he insists that the arming factor "must attach to the current offense as an addition and not just be an element of the current offense." In addition, appellant asserts that "when Proposition 36 uses the terms 'during the commission' and 'armed with a firearm' in subdivision (iii), it must be construed to require that the weapon be available for use in furtherance of the commission of the [current] offense that is the subject of the recall petition." (Italics omitted.) This, in turn, according to the appellant, requires that the arming factor and the current offense be "separate, but 'tethered' such that the availability of the weapon facilitates the commission of the offense."

Appellant's arguments lack merit. Appellant's underlying premise—that "arming" is an element of his current offense of firearm possession—is wrong.

"[P]ossessing a firearm does not necessarily constitute being armed with a firearm." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052.) A defendant can constructively possess a firearm by knowingly exercising "dominion and control" over the firearm without actually possessing it. (*People v. Osuna (*2014) 225 Cal.App.4th 1020, 1030 (*Osuna*) ["[a] firearm can be under a person's dominion and control without it being available for use"]; see also *People v. Elder* (2014) 227 Cal.App.4th 1308, 1313-1314 (*Elder*) [observing that "not *every* commitment offense for unlawful possession of a gun *necessarily* involves being armed with the gun, if the gun is not otherwise available for immediate use in connection with its possession, e.g., where it is under a defendant's dominion and control in a location not readily accessible to him at the time of its discovery"].)

In addition, appellate courts have rejected appellant's interpretation of subdivision (iii) as requiring a current offense to which the arming is "tethered" or to which it has some "facilitative nexus." (See *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797 (*Brimmer*); *Elder*, *supra*, 227 Cal.App.4th at pp. 1312–1314; *Osuna*, *supra*, 225 Cal.App.4th at pp. 1030-1032; *People v. White* (2014) 223 Cal.App.4th 512, 525.) As the court in *Osuna* recognized, this interpretation of subdivision (iii) draws an analogy to the case law construing the section 12022, subdivision (a)(1) sentencing *enhancement* applicable when a person is " 'armed with a firearm in the commission of' a felony." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032; see *Brimmer*, *supra*, 230 Cal.App.4th at pp. 794-795 [holding that the section 12022 enhancement applies only "if the gun has a facilitative nexus with the underlying offense (i.e., it *serves* some purpose in connection with it)"]; accord *People v. Bland* (1995) 10 Cal.4th 991, 1001-1003 (*Bland*).)

The analogy to the section 12022 sentencing enhancement, however, does not withstand scrutiny. Proposition 36 turns on whether the defendant was armed "*[d]uring* the commission of the current offense" (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2), italics added)—not, as with the sentencing enhancement, "*in* [its] commission" (§ 12022, subd. (a)(1), italics added). " 'During' is variously defined as 'throughout the continuance or course of' or

'at some point in the course of.' [Citation.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1029; see also *Elder*, *supra*, 227 Cal.App.4th at pp. 1312–1313 [noting "illogic" of conflating enhancement provision with Proposition 36's ineligibility provision].) As the court in *Osuna* explained, this difference in language is significant.[5] Thus, the *Osuna* court concluded that the phrase " 'armed with a firearm' " in subdivision (iii) simply "mean[s] having a firearm available for use, either offensively or defensively." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1029.)

We agree. In accordance with other appellate courts that have examined this issue, we conclude that the language of subdivision (iii) disqualifies an inmate from resentencing under Proposition 36 if he was armed—had a firearm available for use, either offensively or defensively—at the time he committed the felony of illegal possession of a firearm.

Appellant both possessed a firearm and had it available for use—he held the firearm in his hands when police first sighted him, and thus he was "armed" during the commission of the offense for the purposes of Proposition 36. Consequently, the trial court did not err when it denied appellant's petition for recall of his sentence.

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[5] Appellant assails the *Osuna* Court's distinction between "in" and "during," pointing out that in *Bland*, the Supreme Court used " '*in* the commission' of" and " '*during* the commission of' " interchangeably to describe the application of the section 12022 enhancement. Appellant's reliance on *Bland* is misplaced. In *Bland*, the Court analyzed the application of the section 12022 enhancement in the context of a drug possession offense; the analysis did not require the Court to parse and compare the meaning of the words "in" and "during." (See *Bland*, *supra*, 10 Cal.4th at pp. 1001-1003.) Consequently, we discern no significance from the *Bland* Court's simultaneous use of those terms.

DISPOSITION

The order of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.